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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

NO. 773.

MRS. LORENA MARBRY, PETITIONER,

VS.

GEORGE W. CAIN, ET AL, RESPONDENTS.

ANSWER OF RESPONDENT, GEORGE W. CAIN, TO PETITION FOR WRIT OF CERTIORARI AND BRIEF.

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George W. Cain.

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MAY IT PLEASE THIS HONORABLE COURT:—

Respondent, George W. Cain, for answer to the petition for writ of certiorari and brief filed by petitioner, Mrs. Lorena Marbry, says:

That the petition for writ of certiorari and brief filed by petitioner is lengthy, and many of the cases cited not

in point, and to answer this petition and brief in detail would extend this answer to an undue length.

The pertinent inquiry in this case is whether or not the declaration states such facts as would constitute both willful and malicious injuries to the person of petitioner, by respondent, Cain, so as to bring the judgment obtained by her in the Circuit Court of Shelby County, Tennessee, within the exception of Sec. 17 (2) of the Bankruptcy Act. Title 11 U. S. C. A. Par. 35, which section excludes from the operation of a discharge in bankruptcy, liability "for willful and malicious injuries to the person or property of another."

The Honorable Trial Judge, and the Honorable Supreme Court of Tennessee, were of the opinion that the allegations of the declaration were not such as would bring the judgment within the exception, and that the judgment was barred by respondent's bankruptcy discharge.

It is the insistence of petitioner, Mrs. Lorena Marbry, that judgment by default having been taken against the respondent, Cain, in the automobile suit, all of the facts in the declaration were confessed as true; that a number of terms of the Court had ended, and it was not within the power of any Court, State or Federal to revise, or modify said judgment. Pages 7, 10, 11, and 12 of the printed petition.

We are not trying to revise or modify the judgment, and we have not been able to find any authorities of this or any other Court, holding that a judgment by default is not dischargeable in bankruptcy. In Re; Grout, 88 Vt. 318; 92 Atl. 646, a default judgment was recovered in a

suit styled an action of trespass under a declaration alleging that the defendant assaulted plaintiff; that while she was walking on the street, with due care, he recklessly and negligently ran into her. It was held in that case, that the judgment was barred by defendant's discharge in bankruptcy.

We submit that the fact that respondent, Cain, did not appear and defend the suit, does not amount to a confession that he willfully and maliciously injured plaintiff; he may not have had money to employ counsel, or there may have been some other reason why he did not defend the suit.

It is stated in the case of Bank v. Divine Grocery Co. 97 Tenn. 602, 37 S. W. 390, 34 L. R. A., 445:

> **"A judgment by default is a judgment either from the fact that a defendant has no defense to make or does not appear to make it."**

Assuming that respondent, Cain, did by failing to appear and defend the suit, admit the facts charged in the declaration, there is nothing in the declaration which would connote to respondent, Cain, any intention to willfully and maliciously injure the petitioner. That is the view that the Trial Judge and the Tennessee Supreme Court took of the case, and we insist there is no error in their decision.

In an able opinion in this case, by the Learned Mr. Justice Prewitt, of the Tennessee Supreme Court, reported in 176 S. W. 2d. 815; 180 Tenn. ....., it is stated on Page 4 of the typewritten opinion:

> **"It is insisted on behalf of the plaintiff that,**

> judgment by default having been taken against the defendant Cain in the automobile suit, all of the averments of the declaration must be taken as true. While the declaration contends for compensatory and exemplary damages, the verdict of the jury was general, and it will not be presumed that the jury found the defendant guilty of 'willful and malicious conduct.' Fleshman v. Trolinger, 18 Tenn. App. 208; 74 S. W. 2nd. 1069."

The opinion of the Supreme Court of Tennessee in the instant case, further states: on Page 5:

> "We are unable to see how any inference or conclusion of malicious and willful conduct could result from some person rushing to his automobile that had been started by his small child and undertaking to stop the automobile which ran into an innocent person. **All of the elements of willful and malicious conduct are lacking.**
>
> * * * *
>
> There is nothing in the declaration indicating any act or acts done by the defendant showing a bad motive. There is nothing to indicate any ill will or malice towards the plaintiff, and there is no act by which she could presume that the thing done was intentional or that the doer should have had a consciousness of the probable result of his unlawful act."

And on Page 6:

> "The words 'wilful and malicious' used in the Bankruptcy Act hereinbefore set out seem to contemplate some **intentional willful act.** These words indicate to us the intentional doing of any act which must and does result in injury to a plaintiff, or that class of torts in which malice and injury are always implied."

There is nothing in the declaration to indicate that

the act was done with a bad motive, or so recklessly as to imply a disregard of social obligations, or that the negligence was so gross as to amount to positive misconduct; there is nothing in the declaration from which willfulness and maliciousness can be implied.

Counsel for petitioner, on Pages 9, 10, 11 and 12 of the printed petition, and a number of times in the petition and brief, has quoted the following language from the declaration:

> "After getting into said car and getting hold of the steering wheel, he managed, operated and directed said car so as to run same over the plaintiff who was using the sidewalk."

It is the contention of counsel for petitioner, that that wording of the declaration brings the case within the exception of the Bankruptcy Act, Par. 17, (2) (11 U.S.C. A. Par. 35), excluding from the operation of a discharge in bankruptcy, a judgment for "willful and malicious injuries to the person or property of another."

We submit that every person who drives an automobile, "manages, operates and directs" same, and if they "manage, operate and direct," their automobile negligently and recklessly, so as to strike and injure some one, it does not necessarily follow that they did so "willfully and maliciously."

There is nothing in the above quoted portion of the declaration to indicate that respondent, Cain, purposed or intended to strike petitioner, or that he was conscious in advance that he would run into her. This cannot be presumed. Re: Cunningham, 253 Fed. 663. There is no presumption of a willful injury. Re: Phillips (DC), 298 Fed. 135.

A reasonable inference to be drawn from the declaration in the instant case, is that the respondent, Cain, left his car parked beside his house, with the keys in same; that his child got in the car, started it and respondent ran out, tried to stop the car, but was unsuccessful, and the car ran across the sidewalk and struck the petitioner. That is the view the Learned Supreme Court took of the case, as shown by the language hereinbefore quoted. Page 5 of the typewritten opinion. 176 S. W. 2d. 815, 180 Tenn. .....

Counsel for petitioner on Page 18 of the printed petition for certiorari, quotes from the case of Fleshman v. Trolinger, 18 Tenn. App. 208; 74 S. W. 2d, 1069, to the effect that the defendant, James T. Trolinger, was not in the automobile at the time of the accident, and that the declaration did not contain an averment that he willfully drove the car upon and against the plaintiff, but he did not quote the paragraph immediately following that quotation, as follows:

> "But aside from the proposition just stated, we do not think that there is anything in the declaration which amounts to an averment that the driver of the car, Betty Trolinger, intentionally and maliciously injured Mrs. Garvin. The averments that the car was going at a very rapid and reckless rate of speed, and that it was 'being driven carelessly, wantonly, and in excess of thirty miles per hour, and therefore, in violation of the Statute of the State of Tennessee, regulating the speed of vehicles on any highway or road,' do not connote an intention to injure Mrs. Garvin, or any one else." 18 Tenn. App. P. 218; 74 S. W. 2d. P. 1075, 1076.

In the case of Fleshman v. Trolinger, supra, there was an averment that "the defendant is guilty of gross, will-

ful, wanton, malicious carelessness and recklessness in driving said car at an unlawful and illegal rate of speed."

There is no charge in the declaration in the instant case, of willful, wanton, malicious carelessness and recklessness, as in the case of Fleshman v. Trolinger, supra, and in that case, the Supreme Court of Tennessee, held that the judgment was dischargeable in bankruptcy.

Counsel for petitioner, on Page 21 of his printed petition, states that "it was not in the power of the Tennessee Court to revise or modify said judgment, since a Federal right was involved." We are not seeking to revise or modify the judgment, and the Supreme Court of Tennessee certainly had the right to determine the Federal legal question of whether or not the suit on which judgment was based, was one for "willful and malicious injuries to the person" of the petitioner, so as to bring it within the exception of Sec. 17 (2) of the Bankruptcy Act.

In the case of Fleshman v. Trolinger, supra, it was contended, through an assignment of error, that the Federal Courts alone, had jurisdiction to determine the legal question raised by the motion to quash the execution. In the opinion of the Tennessee Supreme Court in that case, it is stated:

> **"We hold otherwise. We are not aware of any authority supporting this assignment." 18 Tenn. App. Page 221, 74 S. W. Page 1077.**

ANALYSIS OF SOME OF THE CASES CITED BY PETITIONER.

Counsel for petitioner has, in his petition for certiorari and brief, cited and quoted from a number of cases, but none involving the dischargeability of a judgment growing out of the negligent operation of an automobile.

Among the cases referred to by counsel for petitioner, is the case of Allen vs. U. S. 164 U. S. 495 (Page 13 of printed petition.) That is a murder case, and certainly not in point with the instant case; from the very fact of a blow being struck; the very fact that a fatal bullet was fired, it could be inferred as a presumption of fact, that the blow was intended, or the intention to fire the bullet was formed prior to the act, but there would not be that presumption in an automobile accident case.

He also cites the case of Tinker v. Colwell, 193 U. S. 473, 24 S. Ct. 505, 508, 48 L. Ed. 761, on Pages 27 and 29 of the printed petition, which case involves the question of dischargeability in bankruptcy of a judgment for criminal conversation. It is stated in that case:

> **"It is not necessary in the construction we give the language of the exception in the statute to hold that every willful act which is wrong implies malice. One who negligently drives through a crowded thoroughfare and negligently runs over an individual would not, as we suppose, be within the exception. True, he drives negligently, and that is a wrongful act, but he does not intentionally drive over the individual."**

We submit that the later cases in the Federal Courts, following the language quoted in Tinker v. Colwell, supra,

seem to hold without exception that judgment based upon the reckless, negligent, and unlawful operation of automobiles are dischargable in bankruptcy. Re: Madigan (DC), 254 Fed. 221; Exparte Harrison (DC), 272 Fed. 543; Re: Cunningham, (DC), 253 Fed. 663; Re: Roberts (DC), 290 Fed. 257.

Another case cited by counsel for petitioner on Page 7 of his printed petition, is American Lead Pencil Co. v. Davis, 108 Tenn. 252; in that case there was a suit by a ten year old boy for getting one of his arms cut off in some machinery.

Clark v. State, 131 Tenn. 273, 144 S. W. 1137, quoted from on Page 13 of the printed petition, is a case involving trespassing and cutting timber.

The case of McIntyre v. Kavanaugh, 242 U. S. 138 referred to on Pages 16, 21, 27 and 29 of petitioner's printed petition and brief, is a case involving the conversion of some stock, and on Page 29 of the printed petition, counsel for petitioner quotes from the case of Baker v. Bryant Fertilizer Co. (C. C. A. 4), 271 Fed. 473. In that case the record indicated that he, Baker, deliberately took the company's money and used it in cotton speculation.

In the class of cases, cited and relied upon by counsel for petitioner, such as the one for conversion of stock, cutting timber, and other cases mentioned above, malice and injury are always implied, but that is not true of a suit growing out of the negligent operation of an automobile. Re: Phillips, (DC), 298 Fed. 135.

In the case of Re: Phillips, supra; after outlining

the class of cases in which malice is implied and injury presumed, it is stated:

> "This is not so in every case of a violation of traffic laws, **no matter how reckless** they may be. There is no presumption of a 'willful' injury, because even nominal injury does not necessarily result to the plaintiff creditor or to any individual as a result of the illegal act. The act is willful, the result accidental, and negligent, but not willful."

We do not deem the cases cited by counsel for petitioner in point, for the reason that they do not involve the negligent operation of an automobile, and to discuss each case in detail would serve no good purpose.

CASES RELIED ON BY RESPONDENT, CAIN.

We will discuss briefly some of the cases relied upon by the respondent, Cain, to support his contention that the judgment in the instant case was dischargeable in bankruptcy, as held by the Supreme Court of Tennessee.

It is stated in Fleshman v. Trolinger, supra, that "as the exceptions tend to impair the bankruptcy's remedy, the Statute being highly remedial, these exceptions should be so construed as to affect that remedy only so far as is necessarily required by its express terms," citing Collier on Bankruptcy. (13th. Ed.) P. 619.

It is further stated in the above case that the "authorities all agree that, to come within the exception the injuries must be **both** willful and malicious."

It was held in the Fleshman v. Trolinger case, that:

> "A judgment for personal injuries caused by the

> negligence of the judgment debtor is provable in Bankruptcy." Citing Lewis v. Roberts, 267 U. S. 467, 45 S. Ct. 357; 69 L. Ed. 739, 37 A. L. R. 1440, (Annoted.)

In the case of Ely v. O'Dell, 146 Wash. 667, 264 Pac. 715, there was an appeal from an order of the Superior Court of King County, quashing a writ of garnishment in a proceeding to collect a judgment recovered against defendant in an action for personal injuries received through the negligent operation of an automobile.

In the above case, it is stated:

> "The later cases in the Federal Courts, following the language quoted in Tinker v. Colwell, seem to hold without exception that judgments based upon the reckless, negligent, and unlawful operation of automobiles are dischargeable." Citing several Federal cases.

It was held in the case of Ely v. O'Dell, supra, that the judgment was discharged by the bankruptcy of the defendant.

We have heretofore quoted from the case of Re: Phillips, supra, in which it is stated that there is no presumption of a "willful" injury.

In the case of Re: Cunningham, 253 Fed. 663, the declaration alleged, that the plaintiff had just completed the turn, when his automobile, without warning was hit from behind and on the left hand side by the auto truck of the defendant, and charged carelessness and negligence in running into plaintiff's automobile without warning. It was held in that case that there was nothing to show that the defendant drove into plaintiff's car intention-

ally, or that he purposed or intended to strike it at all, or was conscious in advance that he would run into it, and it is further stated: **"This cannot be presumed."**

It was held in the above case that the debt was dischargable in bankruptcy.

In Re: Wegner, 88 Fed. 2d, 899, the declaration charged that the defendant operated his automobile in a wanton and reckless manner, and with utter disregard for the safety of plaintiff, and ran into and struck plaintiff with great force and violence, and in that case it is stated:

> "The most that can be said is that the acts were done 'wantonly and recklessly.' This may be true in any ordinary tort action, in which there is no contention that the acts were done with an **intent** to injure others, or in other words, done **willfully and maliciously."**

In the case of Re: Wilson, 269 Fed. 845, the jury awarded plaintiff punitive damages, and it was held that the judgment was dischargeable in bankruptcy, since it was not one for **willful and malicious** injury.

In the instant case there was no award of punitive damages, but only a general verdict, and it will not be presumed that the jury found the defendant guilty of "willful and malicious conduct." Page 4 of the typewritten opinion of the Supreme Court of Tennessee in this case, citing Fleshman v. Trolinger, supra.

In re: Kubiniec, 2 Fed. Sup. 632, an automobile accident case in which it was held that the judgment was dischargeable in bankruptcy, it is stated:

> "To constitute a willful injury the act which

produced it must have been intentional, or must have been done under such circumstances as to evince a reckless disregard for the safety of others, AND A WILLINGNESS TO INFLICT THE INJURY COMPLAINED OF."

It is further stated in that case:

"Without the record this Court would be limited to a determination based on whether mere negligence constitutes a willful and malicious injury. Re: Roberts, (DC), 290 Fed. 257. In that case it was held that mere negligence did not constitute such an injury and consequently the judgment was dischargeable. The language In Re Wilson (DC), 269 Fed. 845, 846, indicates what appears to be the true intent of the Statute. It is that an intentional wrongdoer should not be allowed to escape liability for an act, **but where the injury was the result of negligence relief should be extended."**

In the case of In re: Cunningham, 253 Fed. 663, the declaration charged that the defendant struck plaintiff's automobile from the rear, and charged "carelessness and negligence in running into plaintiff's automobile." It is stated in the opinion in that case:

"There is nothing to show that he drove into the car **intentionally,** or that he purposed or intended to strike it at all, or was conscious in advance that he would run into it. **This cannot be presumed,** and there is nothing in the complaint which would justify the inference that he drove into the car intentionally."

In the case of In Re, McCarthy, 8 Fed. Sup. 518, it is said:

"The complaint does not allege, and the record does not show that the damages were sustained by reason of any willful and malicious act of the bankrupt. This Court has held under parallel facts that

> a judgment such as was obtained here, was dischargable. This view is sustained by many authorities," citing Tinker vs. Colwell, Supra, Lewis v. Roberts, supra, and other Federal cases.

In Re: Vena, 46 Fed. (2), 81, it is said:

> "Malice extends to an evil design, a wicked notion against some one.
>
> * * *
>
> "In the instant case, there is no contention that there was any intent to run over the child. There is no evidence that the bankrupt knew that the child, or any one was on the street."

The burden was on petitioner to show that the judgment was one of the classes exempted from the effect of a discharge in bankruptcy, (Fleshman v. Trolinger, supra) and we submit that she has not successfully carried this burden.

We could cite other cases from the Federal and State Courts, but do not deem it necessary. We will say, however, that the later cases in the Federal Courts, hold without exception that judgments based upon the reckless, negligent, and unlawful operation of automobiles, are dischargeable in bankruptcy.

CONCLUSION.

Wherefore, respondent, George W. Cain, respectfully insists that the Honorable J. P. M. Hamner, Judge of Division Three of the Circuit Court of Shelby County, Tennessee, and the Learned Supreme Court of the State of Tennessee, were correct in their opinion that the judgment in the instant case, did not result from a cause of action "for willful and malicious" injuries to the person of plaintiff, and that the judgment was dischargeable in bankruptcy; that said decision follows the ruling of this Honorable Court, and of the Federal Courts; is not in conflict with said decisions, and that the petition for writ of certiorari filed by petitioner, Mrs. Lorena Marbry, should be denied.

Respectfully submitted,

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